No. 22,462

IN THE

United States Court of Appeals

For the Ninth Circuit

TRUCKING, UNLIMITED, et al.,
Appellants,

vs.

CALIFORNIA MOTOR TRANSPORT CO., et al.,
Appellees.

On Appeal from the United States District Court for the Northern District of California

BRIEF FOR APPELLANTS

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JURISDICTIONAL STATEMENT

This is an appeal from an order entered October 6, 1967 by the U.S. District Court for the Northern District of California dismissing appellants' first amended complaint for injunctive relief and damages arising out of an alleged violation of §§ 1 and 2 of the Sherman Act, 15 USC §§ 1 and 2.

This action was instituted by appellants on May 6, 1966. Appellants are 14 highway common carriers suing on behalf of themselves and as representatives of a class of similarly situated carriers. Appellants filed the first amended complaint, pursuant to stipula-

tion of the parties and order of the District Court, on February 20, 1967. Appellees made motions to dismiss the first amended complaint upon two separate grounds: (1) failure to state a claim upon which relief can be granted (Rule 12(b)(6) FRCP), and (2) lack of jurisdiction in the District Court (Rule 12(b)(1) FRCP). Only the motion to dismiss for failure to state a claim was considered by the District Court judge in dismissing this action. The motion to dismiss for lack of jurisdiction was not considered below, as made clear by letter of October 25, 1967 (R. 68) written by District Judge William T. Sweigert, Jr., at the request of appellants' counsel. No motions were made respecting the maintenance of the action as a class action under Rule 23 of the Federal Rules of Civil Procedure and that question is not now in issue.

On October 6, 1967 the District Court entered an order dismissing appellants' first amended complaint. The court's order denied leave to appellants to amend further unless appellants moved to amend within 15 days of the entry of the order. Appellants did not so move and the order of dismissal became final on October 21, 1967. Subsequently, on November 1, 1967, appellants' notice of appeal was filed. The appeal was timely. (Rule 74 FRCP.) This court has jurisdiction by virtue of 28 USC § 1291.

STATEMENT OF THE CASE

Appellants

Appellants (plaintiffs below) are highway motor common carriers operating under certificates of public convenience and necessity granted by the California Public Utilities Commission (hereafter "P.U.C.") (R. 3) and the Interstate Commerce Commission (hereafter "I.C.C.") (R. 4). Each appellant is an independent company, separate from the other appellants. Appellants compete for business with one another or with the appellees depending upon the location and nature of shippers and the area of operation of each. The business of appellants is the transportation of goods and packages throughout California and the western United States. (R. 4.)

Appellees

Appellees (defendants below) are likewise highway motor common carriers operating under certificates of public convenience and necessity granted by the P.U.C. and I.C.C. The nature of the appellees' business is the same as that of appellants. (R. 4.) Appellees are the largest common carriers in California and the West. (R. 6.) They have monopoly power when they act in combination. (R. 12.)

The Complaint and the Facts

1. The Formation and Purpose of the Conspiracy

This action was filed May 6, 1966. The first amended complaint asserts two counts, both for conspiracy and monopolization as set forth above. The first count

charges an agreement to destroy and weaken competitors; the second more specifically alleges a conspiracy to block appellants' access to regulatory bodies and courts, to deprive them of fair hearings and, in effect, to substitute appellees for the P.U.C., the I.C.C. and the courts as the regulators of appellants and other carriers. Appellants claim that appellees have violated §§ 1 and 2 of the Sherman Act with respect to truck transportation of goods and packages (R. 5) with resulting damage to appellants. The charge is that appellees have combined and conspired to restrain and monopolize, have monopolized and are attempting to monopolize the business of such truck transportation (R. 5).

For many years prior to February of 1961 and continuing uninterrupted to the date of filing of this action, the California P.U.C. had formulated a policy that competition was to be encouraged among carriers. The P.U.C. accordingly announced this policy to the trucking industry and further announced that, in order to implement the policy, certificates of public convenience and necessity would be liberally granted and their transfers likewise liberally approved. Announcements to the industry were clear and unequivocal. They were made frequently in P.U.C. publications as well as in formal decisions of the P.U.C. granting such certificates. (R. 14.) This policy has not changed and is today still the announced position of the P.U.C. However, it is not being carried out because appellees have supervened the P.U.C. policy and have substituted their own. (R. 15.)

Until February 1961, all carriers, including appellees and some appellants, who desired operating rights or transfers of operating rights took advantage of the P.U.C.'s liberal program. Applications were granted as a matter of course. Because of this announced policy, opposition was rarely encountered. The few protests which were made were asserted by one or only a few carriers directly affected by the application. (R. 14.)

In February 1961, appellees met and discussed methods by which they could eliminate or weaken their competitors. It was their belief that there was too much competition from smaller carriers who had easy access to operating rights which were competitive to appellees. They felt an urgent need to lessen competition because it was having an adverse affect upon their receipts. They met to do something about it. (R. 6, 14.)

The initial meeting was held in a hotel in Coronado, California in February 1961. The sole purpose of the meeting was to explore methods and agree upon means to destroy and restrain competition. (R. 6, 14.) Appellees discussed techniques for lobbying the California P.U.C. and other agencies having control over operating rights. They discussed a program of filing protests and other adversary proceedings in the agencies and courts against appellants' applications for operating rights in order to deter to the point of preclusion the filing of any further applications by competitors. Appellees chose to rely upon the latter method as the means for eliminating and controlling competition. (R. 6, 14.)

Appellees agreed first to make known to the industry in unmistakeably clear terms that any application for certificated rights or transfers then on file or thereafter to be filed would be met with a formal protest by appellees as a group. They agreed that the deterrent effect would be greatest if all competing truckers knew with certainty that each protest would be pursued to the last and highest forum available to hear and determine them and that each available intermediary procedure would be fully exhausted if appellees lost their protests at the level below. (R. 9, 10.) They agreed that their deterrent power over all other carriers would be immeasurably heightened if all of them knew to a certainty that each appellee was committed to the other by agreement to share in financing every protest regardless of the geographical area affected by the proposed application, and regardless of whether the protestant competed with or would compete with the proposed applicant. (R. 6, 9.)

Appellees also agreed that the discouraging effect which they sought to achieve upon potential applications would best be served if all other carriers knew that protests would not be limited to those cases where protest might have merit, but that every application,[1] irrespective of its merits, would be protested. (R. 8.) They further agreed that they would most effectively carry out their program of deterrence if every carrier knew that filing of applications would invariably involve great or prohibitive expenditures of time and

[1]Appellees' agreement excepted insignificant applications such as those seeking rights in local drayage areas (R. 7).

money and cause long and prohibitive delay in the granting of rights should a carrier decide to file an application. (R. 10.)

At their February 1961 meeting, appellees also agreed that for the same reasons truckers would be deterred by appellees' actions from seeking new rights or extensions of rights, truckers who already had applications on file would also choose to abandon them or settle with appellees for lesser rights in consideration of appellees' withdrawal of their protests. (R. 10, 11.)

Appellees further agreed that their plan of deterrence would have its maximum impact on other carriers if appellees, both by word and deed, gave credibility to their plan. Accordingly, they agreed to spread the word or publicize their intended plan of action to members of the trucking industry. This was done by word of mouth at casual encounters, small meetings, and conventions of truckers. In order to prove their plan of action, immediately after their meeting in February 1961, appellees filed protests in every then pending application or transfer proceeding, except those involving local drayage areas and the REA express companies.[2] This pattern of protests has persisted without interruption from February 1961 to the present. (R. 6-8.)

The machinery and facilities of the P.U.C., the I.C.C. and courts by appellees were the means they chose to eliminate and restrain competition. They used

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[2]Appellants are informed that of approximately 60 applications pending in February 1961, 53 protests were filed. Of the 7 remaining, 5 involved local drayage area rights and 1 REA application. One common carrier application was not protested.

the machinery and facilities of the agencies and courts because they were an integral part of the regulatory scheme from which appellees were seeking to exclude competitors. Their conspiracy was not one to use such facilities and machinery to convince the agencies and courts that applicants were "wrong" and appellees were "right" on the merits of the applications made. Their conspiracy was to use such machinery and facilities in such a manner as to deter all truckers from filing applications. (R. 11, 12.)

We do not argue here that once appellees became involved in protests and found themselves within the procedural forum of the agencies and courts they failed to make the best case the facts would permit. On the contrary, this aspect of their activity was perhaps the sole legitimate part of their entire scheme. However, they were not there to protest, as such. They were there to close the door to operating rights for other carriers, to protest—not necessarily to win, although to win was always desirable—in order to set an example, to discipline other carriers, to intimidate them, to implement their own "non-liberal" policy and to create an oligopoly in themselves. Appellees neither agreed to nor did they seek mainly to induce government to act or to petition government to favor them. They sought to prevent appellants from having access to the only source of their business existence by acts aimed directly at competitors. (R. 15.)

Any certificate issued by the P.U.C. could automatically be registered with the I.C.C. prior to 1963.

The policy behind registration was to avoid two hearings on the public convenience and necessity of an applicant's request, one before the P.U.C. and another before the I.C.C. In such a case, no hearing or other method of protest was available in the I.C.C.; therefore, I.C.C. registrations could not be the object of appellees combination. In 1963, however, the I.C.C. adopted procedures which required applications for registration and protests, if desired, by persons opposing such registrations. Following this change in procedure, applications for registrations were protested by appellees pursuant to their conspiracy.

2. Economic and Regulatory Considerations Underlying the Conspiracy

Underlying the decision of appellees to embark upon their course of action were the following economic and regulatory considerations:

a. Appellees' Combined Power Constitutes Monopoly Power

The appellees are the largest common carriers in the West. (R. 6.) Combined, their power is immense and they are able to eliminate and limit competition, solely by reason of their massive economic and procedural cooperation. They have combined, thus acquiring the ability to do that which they could not do alone. (R. 12.)

b. Essential Role of Certificates of Public Convenience and Necessity, Their Registration and Transfer

This case involves common carriers. A trucker cannot become a common carrier without a certificate of public convenience and necessity, and a common carrier cannot expand its territory without such a cer-

tificate authorizing it. A common carrier cannot move its trucks without such specific authorization. A certificate of public convenience and necessity is a grant of a partial monopoly by the state to a business enterprise authorizing it to do business as described. California Public Utilities Code § 1061 et seq.

In certificates of public convenience and necessity issued by the California P.U.C., a provision similar to the following has normally been inserted:

> "Aside from their purely permissive aspect, such rights extend to the holder a full or partial monopoly of a class of business over a particular route. This monopoly feature may be modified or cancelled at any time by the State, which is not in any respect limited as to the number of rights which may be given."
>
> *Application of American Transfer Co.,* Cal. PUC App. No. 43207, Decision No. 63024 (Jan. 1, 1962).

A certificate gives a carrier its business status and financial interest in the activities of the P.U.C. and I.C.C. in granting certificates to competing or potentially competing carriers. Without the need for certificates, there would be no reason for appellees to interest themselves in such proceedings.

It is well known that business expansion has been unprecedented in California and the West. Businesses have expanded their sites and have established branches throughout the area. New businesses and established eastern companies have entered the western markets. Transportation of goods and packages

between the populous centers and the more remote areas increases as such remote areas become more urbanized. The volume of traffic between existing points continually expands.

The role of highway common carriers in the expanding economy of the West is unprecedented. Rights to operate trucks on regular routes between fixed points are not only important but essential to the conduct of business. They are, in economic effect, one and the same. By registering certificates with the I.C.C., common carriers are entitled to use the intrastate routes as part of their interstate operation. 49 USC § 306(a)(7).

It is routine for carriers to seek intrastate rights from the P.U.C. for the purpose of using them in their interstate operation. Interstate common carriers operating between California and adjacent states often seek to register such rights. Registration with the I.C.C. normally eliminates a double hearing and is authorized by federal statute.

Registration, like the certificate to be registered, is an important and valuable business right for the same reasons the certificate is valuable. Certificates are valuable not only because they can be the basis for a common carrier seeking to earn a profit, but also because they can be bought and sold, like any other valuable asset. Because of expanding business and industry in the West and the great role common carriers have had in it, a certificate which cannot be extended as markets expand is of much less value than one which readily can be. Furthermore, if it is

known by a carrier that it will be exceedingly difficult to transfer a certificate, he is, by that reason alone, effectively deterred from seeking a certificate or extension of it in the first instance. (R. 13, 15.)

c. P.U.C., I.C.C. and Courts Are the Exclusive Agencies Through Which Certificates, Their Registration and Transfer Can Be Secured

Motor carriers have no sources other than the P.U.C. and I.C.C. from which to obtain business rights. If carriers do not have full and free access to such agencies, these valuable rights will not be available to them even if they otherwise qualify according to regulatory standards. (R. 13, 15.)

d. Only the Judicial Function of the P.U.C. and I.C.C. Is in Question in This Case

Common carrier rights are obtained only by the filing of a formal verified application and a finding of public convenience and necessity. The proceedings are similar to court proceedings in the sense that they are adversary. In courts as well as in agencies, some proceedings are unopposed. However, in all cases in which opposition occurs, the proceedings are adversary proceedings and the issues are adjudicated.

Appellants' attack is directed solely at appellees' uses of the adjudicative functions of the courts, the P.U.C. and the I.C.C. Such functions in the P.U.C. and I.C.C. are initiated by the filing of a formal verified application (P.U.C. section 1069) upon which a judicial hearing is held. Such functions are further characterized by the use of process, formal notices as regulated by statute, discovery (including the tak-

ing of depositions), use of subpoenas identical to the procedures employed by the Superior Courts in California, the taking of testimony under oath, findings of fact, conclusions of law, decisions and opinions, the use of precedent in the decisional process, the making of a record and the impermissibility of informal appoaches to the hearing officers or commissioners concerning a case while it is under consideration. Calif. P.U. Code §§ 1701-1795; Rules of Procedure of Calif. P.U.C., Articles 1, 2, 4, 5, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20. See Order Revising Rules of Practice and Procedure, Cal. Pub. Util. Commn. Cases No. 4924 and 7234, Decision No. 72329 (effective July 14, 1967). The agencies involved here have myriads of functions other than the one characterized above as judicial. Appellants wish to make it clear, and believe it is clear from the first amended complaint, that no functions other than the judicial functions described are in question in this case. (R. 4, 5.)

3. Implementation of the Conspiracy

Appellees implemented their agreement as planned and fully achieved their aim. (R. 10-12.)

a. Protests

Opposition to applications was carried out by appellees as an unvarying pattern of protests at the Commission level. Appellants set every application for hearing before the appropriate Commission. If appellees lost at that level, they automatically appealed or filed other opposition to the grant of the application, terminating their opposition only when they were able

to force applicants to abandon or settle. Otherwise they proceeded through all levels to the courts of last resort. Their opposition to applications employed full scale and fully financed use of investigative techniques, procurement of witnesses, elaborate preparation and ample use of attorneys at each stage of such opposition proceedings. (R. 6-8.)

b. Financing

Pursuant to the plan, appellees financed their protests to applications by monthly contribution by each of them to cover expenses involved. Contributions were proportionate to each appellee's yearly income. (R. 6, 9.) Although appellees opposed application filed by any carrier, contributions were made by each appellee each month, regardless of whether particular applications then being protested had any competitive effect on each appellee. (R. 6, 9.)

c. Publicity

Beginning in February of 1961, the existence, purpose, and means of effectuating the agreement of appellees was deliberately disseminated to other truckers. Appellees publicized to the industry the fact that they would use their combined financial strength to protest all applications present and future, that opposition would be complete, unyielding and uncompromising, with no possible end in sight for applicants short of the forum of last resort. (R. 9, 10.) Appellees announced to the industry that it would be unwise and financially foolish for carriers to file applications and

that it would be wise for those who filed applications to terminate or abandon them or agree to settle on terms to the advantage of appellees. (R. 10.)

Dispersion of such information was directed neither to the public at large nor to the P.U.C., the I.C.C. or the courts. No agency or court participated in the formulating or implementation of appellees' agreement. The agreement was never approved.

4. Achievement of Aims

Appellees' aims were fully realized. Appellees' protests became procedurally engrafted upon all proceedings for certificates, their registration and transfer. (R. 10, 11.) The threat of undeviating opposition, the dissemination of the fact of their resolve to protest and the actual acts of protesting caused the filing of applications to progress from a posture in which many were filed and practically all granted to a point where practically none were filed by appellees' competitors. (R. 11.) The impact of appellees' behavior was so pervasive that it subverted the machinery and function of the P.U.C., the I.C.C. and the courts to appellees' own illegal purposes. (R. 15.)

As a result of their achieved purpose, appellees became, in effect, the regulators of certificates of public convenience and necessity, their registration and transfer, in place of the P.U.C., the I.C.C. and the courts. (R. 15.) Each appellant and other motor carrier who filed an application or considered filing an application, and who thereafter decided against it because of appellees' combination, was regulated by

appellees rather than the P.U.C., the I.C.C. or the courts. (R. 15.)[3]

SPECIFICATION OF ERRORS

1. *The District Court Erred in Holding that the Combination of Appellees Pleaded in the First Amended Complaint Is Not Prohibited by 15 USC §§1 and 2 (Sherman Act).*

2. *The District Court Erred in Holding that the Combination of Appellees Is Immune from the Sherman Act by Reason of the Principles Stated in Eastern Railroads Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961).*

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[3]There were two categories of injured competitors:

1. Those carriers who considered filing applications but failed to do so because of the threat of appellees' conspiracy were adversely affected in that they were deprived of valuable business rights which, in the absence of the conspiracy, and upon application, would have been granted. (R. 11.)

2. Those carriers who have had applications on file since February 1961 have been adversely affected in one or more of the following ways:

a. If the applicant prevailed on the merits in full, in addition to detriment suffered by delay, he has been forced to expend sums of money and time which in the absence of the conspiracy would not have been required. (R. 11.)

b. If the applicant lost on the merits and did not receive valuable operating rights, he has nevertheless been required to expend money and time which otherwise would not have been required were it not for the conspiracy. (R. 11.)

c. If the applicant won or lost on the merits in the first instance but lost at the next appellate level, and if after losing at the next appellate level failed to pursue his application to the highest appellate level by reason of defendants' conspiracy, he has been deprived of potential operating rights.

d. If, before a final decision, an applicant compromised or abandoned his application, he has been deprived of valuable business rights, has suffered deteriment by delay and has been required to expend sums of money and time which in the absence of appellees' conspiracy would not have been required. (R. 11.)

The holdings specified as errors appear in the Memorandum of Decision of the Hon. William T. Sweigert, District Judge (R. 44); 1967 Trade Cas., page 84,739 (N.D. Cal.) and in his letter to appellants' counsel dated October 25, 1967 (R. 68).

QUESTIONS PRESENTED

1. Do appellees' activities constitute lobbying or political activity of the type protected from the Sherman Act by the *Noerr* doctrine?

2. Have appellees' restraints been accomplished through the inducement of governmental action, as required for *Noerr* protection, rather than through direct interference with appellants' business opportunities?

3. Are appellees protected from the Sherman Act in light of their combination to deprive appellants of their First Amendment right to petition the regulatory commissions and courts?

SUMMARY OF ARGUMENT

The court below dismissed appellants' complaint on the basis of *Eastern Railroads Presidents Conference v. Noerr Motor Freight,* 365 U.S. 127 (1961) and *United Mine Workers of America v. Pennington,* 381 U.S. 657 (1965). Neither case protects appellees' activities from the Sherman Act. Both cases represent a

single narrow exception to the broad application of the antitrust laws. In those cases the Supreme Court characterized the activity of the defendants as political activity which Congress did not intend to be reached by the Sherman Act. The court in *Noerr* also ruled, based upon its prior decision in *Parker v. Brown,* 317 U.S. 341 (1943), that valid state actions cannot be the subject of antitrust enforcement. The court suggested further that in the absence of carving out the "political activity" exception to the operation of the Sherman Act, problems under the First Amendment's right to petition clause would arise. Appellants contend as follows:

1. The rule stated in *Noerr* and affirmed in *Pennington* that the Sherman Act does not proscribe lobbying and other political activities is not applicable to this case. Appellees have restrained appellants not through *Noerr*-protected political activities, but through the misuses of courts and the judicial functions of the Commissions. Such activities have consistently been held to be within the ambit of the Sherman Act, as demonstrated most clearly in cases involving misuses of patent litigation for antitrust purposes.

2. *Noerr* itself provides that its own protection from the Sherman Act is not available where the anticompetitive activity involved accomplishes restraints directly upon competitors rather than indirectly through state or governmental action. In the present case, the appellees deterred and restrained appellants from obtaining operating rights by the direct threat

of judicial harassment, not through the decisions or actions of the judicial bodies themselves.

3. The rule of *Parker v. Brown,* supra, is not applicable to the present case because appellants are not attacking the decisions or actions taken by any public agency.

4. The dictum in *Noerr* that the First Amendment right to petition questions would be raised by an application of the Sherman Act in that case is not relevant to the case at bar. The right to petition courts and other judicial bodies is not an unlimited right, but is subject to reasonable regulation to prevent abuse of the right and to protect the orderly conduct of government. The right to petition does not extend to individuals who petition the judiciary for purposes of restraining trade or accomplishing other illegal objectives in the manner pleaded. In no event does the right to petition extend to appellees because they have not petitioned for redress of grievances.

5. Conversely, the First Amendment right to petition afforded *appellants* has been abridged by appellees through their restraints on appellants' ability to seek operating rights before the Commissions and courts. The large scale conspiratorial effort of the appellees and their consequent control over appellants' rights has permitted appellees, in effect, to displace the Commissions and courts as the state regulators of the rights involved. Because the abridgement of appellants' rights was for anti-competitive purposes, such acts are also in violation of the Sherman Act.

ARGUMENT

I. MISUSES OF THE JUDICIAL PROCESSES OF THE COURTS AND REGULATORY COMMISSIONS FOR ANTITRUST PURPOSES ARE PROHIBITED BY THE SHERMAN ACT.

A. The Noerr and Pennington Decisions Protect Political Activity, Not Judicial Activity, from the Sherman Act.

Appellants' basic position is that the judicial processes of the courts and regulatory agencies cannot be used to effectuate an illegal purpose. A well-established body of law, and particularly the patent-antitrust cases, has affirmed this principle.

Neither the facts nor the language of *Noerr* or *Pennington* apply to the judicial abuse cases or, for that reason, to the case at bar. Because the *Noerr-Pennington* ruling is the basic authority upon which appellants' complaint was dismissed below, appellants will discuss the cases briefly here to demonstrate what they do (and do not) stand for before discussing the patent-antitrust and judicial abuse cases upon which the complaint is based.

In the *Noerr* case, the defendants were a group of railroad companies which had conspired against a group of truckers in order to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business, to create an atmosphere of distaste for the truckers among the general public, and to impair the relationships existing between the truckers and their customers. The truckers brought suit against the railroad companies alleging violations of Sections 1 and 2 of the Sherman Act.

The railroad companies answered these charges by admitting that they had conducted a publicity cam-

paign designed to influence the passage of state laws relating to truck weight limits and tax rates on heavy trucks and to encourage stronger police enforcement of the state laws penalizing trucks for overweight load and other traffic violations. The defendants contended that their activities were merely aimed at informing the public and the legislatures of the several states involved of the truth with regard to the "enormous" damage done to the roads by the operators of heavy and especially overweight trucks, and of other road hazards created by the trucks.

In the district court the truckers sought to enjoin the defendants from all these activities. On appeal to the Supreme Court, however, the parties stipulated that damages would be sought only for injury to the truckers resulting from the Governor's veto of the "Fair Trucking Bill."

In finding that the defendants' activities could not be prosecuted as violations of the Sherman Act, the Supreme Court repeatedly made clear the grounds upon which this decision was reached. Throughout the opinion, the court stated that it would not apply the Sherman Act or any judicially determined antitrust standards because to do so would be to interfere with legislative and executive actions, and thus, by implication, would be to breach constitutional separation of powers between the judiciary and the other branches of government. In order to defeat the Fair Trucking Bill, the defendants had engaged in lobbying and political activity with the legislatures of several states and the executive office of Pennsylvania. Only this activity was at issue in *Noerr*.

The *Pennington* case merely affirms the principles established in *Noerr*. The *Pennington* case, like *Noerr*, involves conspiratorial attempts to use lobbying and political pressure in order to influence the executive branch of government. As such, *Pennington* neither enlarges nor shrinks the narrow Sherman Act immunity created in *Noerr*.

In *Pennington*, a small coal company charged (in a cross-complaint to a union action) that the United Mine Workers (UMW) had conspired with certain large coal companies to restrain trade and monopolize the coal industry by driving the smaller companies out of business. The gist of the complaint was that the union and the larger companies had agreed to impose high standards and requirements on the smaller companies, knowing that the smaller companies could not meet these higher requirements and would be forced out of business.[4] The *Noerr* issue arose from an agreement between the unions and the larger companies to approach the Secretary of Labor and secure the establishment of a minimum wage rate for coal operators selling to the Tennessee Valley Authority (TVA) under the provisions of the Walsh-Healey Act, and to solicit the executives of the TVA to purchase coal only by contracts which, in effect, excluded the spot-market sale of coal by the small

[4]These antitrust practices consisted of agreements between the unions and large companies that the large companies would mechanize the mines; that the unions would help finance the mechanization; that union wages would then be substantially increased as productivity increased with mechanization; that these higher wage increases would be demanded from smaller, unmechanized companies, even though the smaller companies clearly would not have the ability to pay; and other practices.

companies to the TVA. In short, the *Noerr* issue involved strictly lobbying and political pressure on members of the executive branch of government to take actions detrimental to the small coal companies.

Noerr and *Pennington* protect only lobbying, political activity and similar forms of petition aimed at securing the passage and enforcement of laws by the legislative and executive branches of government. In *Noerr* the court was precise in defining the exception to the Sherman Act. The court's language clearly demonstrates that it was dealing with a question of substantial impairment of the power of government to take action through its legislative and executive offices (365 U.S. at 137), and with ". . . the whole concept of representation . . ." and with "the ability of people to make their wishes known to their representatives." (365 U.S. at 137.)

Throughout the opinion, the court emphasized that it refrained from applying the Sherman Act to activity which was political in nature and which involved the right of petition to the legislative and executive branches of government. The court stated no fewer than eight times that it did not intend to interfere with the legislative or executive passage and enforcement of laws.[5]

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[5]1. "We accept, as the starting point for our consideration of the case, the same basic construction of the Sherman Act adopted by the courts below—that no violation of the Act can be predicated upon the *mere attempts to influence the passage or enforcement of laws.*" (365 U.S. at 135) (All emphasis added in this footnote.)

2. "We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in

At no time, however, did the court state or imply that it could not or would not control, investigate, or sanction misuses of judicial processes within the courts themselves or within agencies which exercise judicial powers and over which the courts have long exercised the power of judicial review. The court in *Noerr* made no such statement because no such issue was presented in that case, and because to do so in any event would be to overturn well established law which has permitted—indeed compelled—courts to guard with utmost care the right to fair and full hearings in adversary proceedings. Guarding against

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an attempt to *persuade the legislature or the executive to take particular action with respect to a law. . . .*" (365 U.S. at 136)

3. "And we do think the question is conclusively settled, against the application of the Act, when this factor of essential dissimilarity is considered along with the other difficulties that would be presented by a holding that Sherman Act forbids associations *for the purpose of influencing the passage or enforcement of laws.*" (365 U.S. at 137)
4. "For these reasons, we think it clear that the Sherman Act does not apply to the activities of the railroads *at least insofar* as those activities comprised mere solicitation of governmental action with respect to the *passage and enforcement of laws.*" (365 U.S. at 139)
5. "The right of the people to inform their representatives in Government of their desires *with respect to the passage or enforcement of laws* cannot properly be made to depend upon their intent in doing so." (365 U.S. at 138)
6. "There are no specific findings that the railroads attempted directly to persuade anyone not to deal with the truckers. Moreover, *all of the evidence* in the record, *both oral and documentary,* deals with the railroads' efforts to *influence the passage and enforcement of laws.*" (365 U.S. at 142)
7. "No one denies that the railroads were making a genuine effort *to influence legislation and law enforcement practices.*" (365 U.S. at 144)
8. "That (Sherman) Act was not violated by either the railroads or the truckers in their respective campaigns *to influence legislation and law enforcement.*" (365 U.S. at 145)

a misuse of such processes in the courts and administrative agencies has traditionally been considered *not* to infringe upon Constitutional rights of petition or the functions of other branches of government. The courts have thus not refrained from applying statutory or common law remedies where such abuse exists, no matter what the purpose of such abuse, antitrust or otherwise.

Appellants believe that the court in *Noerr* clearly and unequivocally defined what it meant to protect. It called the activities political activity and lobbying. Appellants do not believe that the court had anything in mind other than the plain meaning which those words impart. When taken together with the facts of the case and descriptive passages of activities in the *Noerr* opinion, they are not subject to semantic disputes. The Supreme Court meant to protect only lobbying and political activities as they are commonly known and accepted in their traditional roles within the representative branches of government.

B. The Patent-Antitrust Cases and Other Judicial Abuse Cases Show That Appellees' Misuses of Judicial Process Are Subject to the Antitrust Laws.

If appellees' activities are not political activities as defined in *Noerr,* the only ground for exempting their conspiracy from the antitrust laws is lost to appellees, and without any further showing, the Sherman Act must apply. The Sherman Act, supported by strong public policy considerations, is broadly interpreted to cover almost every type of anti-competitive behavior not specifically exempted from the Act.

Appellees' activities in this case not only fall outside the narrow exemption provided by *Noerr;* by using the adjudicative processes of the courts and commissions in order to restrain competition, the appellees also fall directly within an area specifically prohibited by the antitrust laws.

United States v. Singer Mfg. Co., 374 U.S. 174 (1963);

Lynch v. Magnavox Co., 94 F.2d 883 (9th Cir. 1938);

Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416 (10th Cir. 1952);

United States v. Krasnov, 143 F.Supp. 184 (E.D. Pa. 1956);

United States v. Hartford Empire Co., 46 F. Supp. 541 (N.D. Ohio 1942), *aff'd,* 323 U.S. 386 (1944);

Stewart-Warner Corp. v. Staley, 42 F.Supp. 140 (W.D. Pa. 1941);

Clapper v. Original Tractor Cab Co., 270 F.2d 616 (7th Cir. 1959).

In *U.S. v. Singer Mfg. Co., supra,* Singer conspired with two Italian and Swiss companies to exclude the importation of Japanese competitors' products. The restraint and attempt to monopolize was accomplished in two basic steps. First, the defendants joined interests by withdrawing opposition to each other in patent office proceedings and cross-licensing and assigning certain patents. Second, pursuant to this conspiracy, Singer brought infringement actions in the courts and protest proceedings before the United States Tariff Commission, a quasi-judicial agency.

(374 U.S. at 188.) The purpose of the suits and proceedings was to restrain a competitor from competing effectively in the defendants' markets.

The Supreme Court held that the conspiracy and the proceedings taken pursuant to it were in violation of the Sherman Act. The court recognized that existing law did not declare a joining of patents illegal on its face. But when such agreements were made to restrain a competitor's activities, they ran afoul of the antitrust laws.

> "Thus by intertwining itself with Gegauf and Vigorelli in such a program, Singer went far beyond its claimed purpose of merely protecting its own 401 machine—it was protecting Gegauf and Vigorelli, the sole licensees under the patent at the same time, under the same umbrella. This the Sherman Act will not permit." (374 U.S. at 193.)

The present case presents the same essential features that are found in *Singer*—a conspiracy to protect a group's position in an industry through the bringing of proceedings against competitors in the courts and agencies.

This circuit has long held that such conspiracies are in clear violation of the antitrust laws. In *Lynch v. Magnavox Co., supra,* plaintiff brought an antitrust action against the defendants who, as in the present case, demurred to the complaint. The district court upheld the demurrer, and the Court of Appeals reversed, finding that plaintiff stated a good cause of action. The complaint alleged a conspiracy to restrain trade and an attempt to monopolize a part of the radio equipment industry. The method by which the

defendants accomplished their restraint was to join their patents in a conspiracy, and then, " 'under the threat of patent litigation of all asserted patent rights of all of the parties to the pool and combination,' " to force competitors out of business. (94 F.2d at 886.) More particularly, the defendants' scheme was to have one member of the conspiracy bring an action, followed by other members bringing the same or similar actions, and thus have the conspiracy, as a group, harass competitors. (94 F.2d 886.)

Plaintiffs alleged that these actions "were not made, done, suffered to be done, or committed in good faith, or in an honest belief by defendants as to the validity of" their patents, but were committed to restrain competition. (94 F.2d 887.) In response to this allegation, and in finding a good cause of action, the court stated:

> "We may assume that each of those acts would be lawful, and still a conspiracy might be shown. *If the agreement has an unlawful purpose, it is a conspiracy, notwithstanding that the means used to carry it out were lawful.*" (94 F.2d at 889; emphasis added.)

In stating that the plaintiffs brought a good cause of action, the court stressed that it was the conspiracy to restrain trade, not just the actions filed by the conspirators, which constituted the antitrust violation. If the actions filed in court were filed without probable cause or in bad faith, these actions standing alone would, of course, be illegal as antitrust restraints and malicious prosecutions. If these actions

were filed with probable cause and in good faith, they would still be illegal since they were filed as part of a conspiracy to restrain trade. In either case, the court made clear that it was the purpose of the conspiracy itself, not the individual acts taken pursuant to the conspiracy, which determined whether a violation of the antitrust laws existed. In the present case, appellants have alleged that appellees instituted their proceedings for the purpose of restraining trade and monopolizing the industry. Irrespective of whether appellees had colorable ground for protesting appellants' applications, if such proceedings were brought pursuant to an illegal purpose, such activities are prohibited by the Sherman Act. *Noerr* does not overturn this law. *Noerr* does not deal with conspiracies to restrain trade by harassment through the judicial processes of the courts and commissions.

Other courts have also confirmed the antitrust doctrine established in *Singer, Lynch* and similar cases. In *Kobe, Inc. v. Dempsey, supra,* the plaintiffs joined together to bring an alleged patent infringement action against the defendants. The defendants, in a cross-complaint, alleged inter alia that the plaintiffs had conspired to restrain the defendants' trade; that the infringement action was instituted pursuant to this conspiracy; and that the infringement action was in itself unjustified and brought in bad faith.

The trial court found that the defendants had stated a good cause of action in their cross-complaint, and a trial ensued. The trial court found that plaintiffs' conspiracy was a violation of the anti-

trust laws, and awarded damages and entered an injunction against the conspiracy. Plaintiffs appealed the decision on the cross-complaint and the Circuit Court of Appeals affirmed. The plaintiffs (cross-defendants in the antitrust action) in *Kobe* contended on appeal that they had believed there was a genuine infringement of their patents and that they had the right to use available legal forums in order to protect their interests. In refuting this contention, the Court of Appeals stated:

> "We fully recognize that free and unrestricted access to the courts should not be denied or imperiled in any manner. *At the same time we must not permit the courts to be a vehicle for maintaining and carrying out an unlawful monopoly which has for its purpose the elimination and prevention of competition.*" (198 F.2d at 424; emphasis added.)

Concerning the plaintiffs' contention that their infringement suit against defendants was brought in good faith and was therefore immune to antitrust attack, the court accepted the trial court's findings that the plaintiffs had believed in good faith that their rights were infringed, but the court also found that the infringement suit itself was brought primarily in furtherance of a conspiracy to restrain competitors. It was the conspiracy to restrain trade, not the steps taken pursuant to it standing alone, which the court found in violation of the antitrust laws.

> "We have no doubt that if there was nothing more than the bringing of the infringement

> action, resulting damages could not be recovered, but that is not the case. The facts as hereinbefore detailed are sufficient to support a finding that *although Kobe believed some of its patents were infringed, the real purpose of the infringement action and the incidental activities of Kobe's representatives was to further the existing monopoly and to eliminate Dempsey as a competitor.* The infringement action and the related activities, of course, in themselves were not unlawful, and standing alone would not be sufficient to sustain a claim for damages which they may have caused, *but when considered with the entire monopolistic scheme which preceded them we think, as the trial court did, that they may be considered as having been done to give effect to the unlawful scheme.* (Citing cases)" (198 F.2d at 425; emphasis added.)
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> * * *
>
> "To hold that there was no liability for damages caused by this conduct, though lawful in itself, would permit a monopolizer *to smother every potential competitor with litigation . . . and leave the competitor* without a remedy." (198 F.2d at 425; emphasis added.)

This decision applies directly to the case at hand, where to allow the appellees as a group to indulge in unlimited judicial proceedings against appellants, whether such proceedings individually are brought with or without probable cause in themselves, is to allow the appellees to restrain trade and create an effective monopoly in violation of the Sherman Act.

In *United States v. Krasnov, supra,* the defendants were charged with conspiring to restrain trade and

create a monopoly by excluding competitors from the defendants' patent pool and by harassing competitors with infringement suits. Similar to the case at hand, the defendants in *Krasnov* agreed to bring harassment suits upon the mutual consent of the members of the conspiracy and upon a sharing of the costs of the suits.

On a motion by the government for summary judgment, the court held that the defendants' activities violated the antitrust laws. On the issue of the defendants' misuse of judicial process, the court stated:

> "That the harassing suits against competitors, previously discussed in some detail, were designed as and were actually only harassing suits is clear from an examination of the correspondence between the parties and the court feels that such conclusion is inescapable from an objective analysis of the documents. All of these actions taken in concert constitute a clear violation of the Sherman antitrust act. . . ." (143 F.Supp. at 202.)

This language might well have been written for the present case. Appellants not only have pleaded the existence of harassing activity constituting a good cause of action, but also possess correspondence and other evidence sufficient to prove the allegations at trial.

Systems of litigation for anti-competitive purposes have been broadly condemned. In *U.S. v. Hartford-Empire Co., supra,* the District Court described the system used there:

> "Another part of the plan was a system of litigation against all remaining outsiders. Here the

power of litigation pursued by a strong combination of two companies, one of which, Hartford, was dominated and partially owned by a third powerful company, Corning, backed by unlimited financial means, is brought into play against individual companies, most of them small manufacturers of glass products. Suits were brought against Hazel-Atlas, Kearns-Gorsuch, Lamb, Nivision-Weiskopf and Ober-Nester. The expense of this litigation was shared equally between Hartford and Owens, and this expense was by no means small. The record discloses that Hartford expended substantially $900,000 in the pursuit of litigation against so-called outsiders. The Hartford Company did most of the work, but Owens contributed a substantial part, and the patent lawyers of both companies were continually consulting each other with respect to both substance and procedure." (46 F.Supp. at 565.)

There is no meaningful distinction between the systems described in *Hartford-Empire, Singer* and other cases cited here and the system contrived by appellees.

See also *Stewart-Warner Corp. v. Staley, supra* (Allegations that parties joined in concerted action to threaten competitors with bad faith litigation states a good cause of action under the antitrust laws);

Clapper v. Original Tractor Cab Co., supra (Attorneys' fees should be included in antitrust damages awarded against defendants who conspired to misuse patents by bringing unfounded suits against competitors).

C. A Misuse of the Judicial Processes of the Commissions Is Indistinguishable from Misuses of the Courts. Both Activities Alike Are Prohibited by the Antitrust Laws.

Appellants have pleaded that appellees have used the United States courts and the Supreme Court of California in their plan of anti-competitive litigation. (R. 4.) That such a program to restrain trade falls within the antitrust laws, appellants believe, cannot be doubted.

A conspiracy to restrain competition is no less a violation of the antitrust laws when it is effected through a perversion of the adjudicating processes of the commissions than of the courts. This proposition was established, for example, in the *Singer* case, *supra,* where the method of restraint employed by the defendants' conspiracy was to bring infringement suits in the courts and adversary proceedings before the United States Tariff Commission.

The essential similarity of adversary proceedings in the courts and the agencies has also been established by the law of malicious prosecution. The courts have recognized that one does not have a right to bring an action or proceeding without probable cause in a court *or* administrative body. This principle was succinctly stated in *Melvin v. Pence,* 130 F.2d 423 (D.C. Cir. 1942), where the court refuted the contention that a misuse of administrative bodies differed from a misuse of courts. The court stated:

> "We agree with plaintiff that these principles (prohibiting misuse of courts) are clearly applicable to administrative proceedings. Much of the jurisdiction residing in the courts has been

> transferred to administrative tribunals, and much new jurisdiction involving private rights and penal consequences has been vested in them. In a broad sense, their creation involves the emergence of a new system of courts, not less significant than the evolution of chancery. The same harmful consequences may flow from the groundless and malicious institution of proceedings in them as does from judicial proceedings similarly begun. When one's livelihood depends upon a public license, it makes little difference to him whether it is taken away by a court or by an administrative body or official. *The administrative process is also a legal process, and its abuse in the same way with the same injury should receive the same penalty.*" (130 F.2d at 426; emphasis added.)
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> * * *
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> "In our judgment no other conclusion would be tenable. When private as well as public rights more and more are coming to be determined by administrative proceedings, it would be anomalous to have one rule for them and another for the courts in respect to redress for abuse of their powers and processes." (130 F.2d at 427.)

See also *National Surety Co. v. Page,* 58 F.2d 145 (4th Cir. 1932).

The questions arise, however, whether the particular administrative agencies involved in this case—the P.U.C. and I.C.C.—function as courts and, if so, whether those functions have been used by appellees as the methods for their restraints. Appellants believe both questions must be answered in the affirmative.

Reams have been written in a fruitless search for an analysis which will characterize regulatory agen-

cies as "quasi-judicial" or "quasi-legislative." Appellants do not wish to engage in this search. No label given to these agencies should decide the crucial issue of what agency functions are involved in this action. The fact is that most regulatory agencies, including the P.U.C. and I.C.C., are a kind of fourth branch of government performing functions some of which are judicial in nature, some legislative in nature, and some even executive in nature.

That the P.U.C. performs judicial functions, and to that extent is a judicial body, was established unequivocally by the California Supreme Court shortly after the passage of the California Public Utilities Act of 1911 in *Pacific Telephone & Telegraph Co. v. Eshleman,* 166 Cal. 640 (1913). In that case, after a hearing before the P.U.C., and upon appeal to the California Supreme Court, Pacific Telephone raised certain jurisdictional questions which included the arguments that a "proceeding [before the Commission] sought to be brought up for review must in its nature be a judicial proceeding," and that a Commission proceeding in that case was not judicial. (166 Cal. at 648.) In deciding the jurisdictional questions, the Supreme Court stated as follows:

> "A minor branch or corollary of the main argument upon these jurisdictional questions rests upon the proposition that in the matter here under review the Railroad Commission was not exercising judicial functions, but that its acts were purely legislative or legislative-administrative. As the Public Utilities Act is here for the first time before this court, as the question is thus

fairly within this case, and as to ignore it is but to necessitate its consideration in subsequent litigation, it is proper to say that *we hold the powers and functions of the Railroad Commission in many instances, and in the present one, to be of a highly judicial nature.* That judicial powers were with deliberation vested in the Commission the language of the constitution and of the legislative enactments following the constitution leave no doubt. Thus the constitution itself declares: 'The Commission shall have the further power . . . *to hear and determine complaints* against railroad and other transportation companies; *to issue subpoenas and all necessary process* and send for persons and papers; and the commission and each of the commissioners shall have the power to *administer oaths, take testimony and punish for contempt in the same manner and to the same extent as courts of record.*' (Sec. 22, art. XII.) While without quoting, a reading of sections 22 and 23 of article XII of the constitution and of sections 53 to 81 of the Public Utilities Act will *establish beyond doubt that the Railroad Commission is empowered to sit, and in the performance of its most important duties must sit, as a tribunal exercising judicial functions of great moment.* It may be said that the final order of the commission in many instances is legislative-administrative in character, but nonetheless the *ordained procedure by which this result is to be reached, the determination of controverted facts between private litigants and disputants, and the decision upon these controverted matters, are strictly judicial. (Robinson v. Sacramento,* 16 Cal. 208; *Imperial Water Co. v. Board of Supervisors,* 162 Cal. 14 [120 Pac. 780])." (Emphasis added.)

With respect to the P.U.C., the following passage from McKeage, *Public Utility Regulatory Law* (1956) makes the same point:

> "Much has been said concerning the internal adjudicating process of an administrative tribunal; that is, the procedure whereby such tribunal arrives at its decision. Very probably, the internal adjudicating process of the average administrative tribunal, in actual fact, is on par with that same process in the average court. *Judges and lawyers realize that where this particular process is corrupted or perverted, strict adherence to due process of law in other fields can be rendered futile and of no consequence.* Courts are no more exempt from this fault than are administrative tribunals. In the final analysis, faithful adherence to due process of law in *this particular phase of the administration of justice* depends upon the integrity of the members of the tribunal exercising the adjudicating process." (At p. 84; emphasis added.)
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> * * *
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> "In and of itself, there is no magic in the term 'court.' As a matter of fact, at least one of the state public utilities commissions (that of California) *is a court of record* in addition to being an administrative tribunal. The State Constitution so created it and no State court, except the Supreme Court to a very limited extent, may interfere in any way with its action or decisions. *It has the power, as does each commissioner thereof, to commit and punish for contempt, and its function, in many cases, is exclusively that of a court, such jurisdiction having been taken from the*

courts and given to it." (At pp. 84-85; emphasis the author's.)

* * *

"In fact, the Commission is both a court of record and an administrative tribunal and, in many instances, exercises purely judicial functions, such functions having been taken from the courts by the Legislature and deposited with the Commission pursuant to the plenary authority contained in Article XII of the State Constitution." (At pp. 106-107.)

The I.C.C. also acts largely as a court, as demonstrated by the Code of Ethics for Practitioners, Rules 2 and 8.

"2. The Duty of the Practitioner to and His Attitude Towards the Commission

In many respects the Commission functions as a Court, and practitioners should regard themselves as officers of that Court and strive to uphold its honor and dignity. The Commission, not being wholly free to defend itself is peculiarly entitled to receive the support of the practitioner against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a member or employee of the Commission it is the right and duty of the practitioner to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected." (Emphasis added.)

"8. Private Communications with the Commission

In the disposition of contested proceedings brought under the Interstate Commerce Act the

> Commission exercises quasi-legislative powers, but it is nevertheless acting in a quasi-judicial capacity. It is required to administer the Act and to consider at all times the public interest beyond the mere interest of the particular litigants before it. To the extent that it acts in a quasi-judicial capacity, it is grossly improper for litigants, directly or through any counsel or representative, to communicate privately with a commissioner, examiner or other representative of the Commission about a pending cause, or to argue privately the merits thereof in the absence of their adversaries or without notice to them. Practitioners at all times should scrupulously refrain in their communications to and dismissions with the Commission and its staff from going beyond ex parte representations that are clearly proper in view of the administrative work of the Commission." (Emphasis added.)

The question, then, is not whether the P.U.C. and I.C.C. are arms of the legislature or the judiciary—clearly they are both—but which of these functions is involved in the present case. To make that determination, more particular distinctions must be drawn between the judicial and legislative functions which take place within the agencies themselves. Judge Friendly's article entitled "The Federal Administrative Agencies: The Need for Better Definition of Standards," 75 Harv. L. Rev. 863 (1962) makes the controlling distinctions.

> ". . . I find valid and important the distinction between what anyone would recognize as a clear delegation of legislative power, with no quasi

about it—I have cited the SEC's rule-making power for short sales as an instance—and the application of a general standard to a myriad of instances. * * * The SEC's rules in regard to short sales are the sort of things which Congress could well have put out on its own; they are no more detailed than many provisions of the income tax. The reasons for delegation in that instance are simply that Congress does not have the time, or the will, to do all these things and that, even if Congress initially promulgated a set of rules on short sales every bit as good as the SEC's, it would be too hard for Congress to effect change, in an area where speedy change may be needed. In contrast, the very nature of Congress, with one house having 100 members and the other 435, makes it wholly unfit to determine the rail and truck rates on new automobiles or who should run the television station in Kankakee; the difficulty is not just lack of time but an institutional lack of aptitude. Unlike the short sale rules, such decisions involve not a prescription for the whole or even a segment of an industry but the application of a standard to a concrete case, requiring not only the *determination of the standard but also the accurate ascertainment and proper weighing of scores of subsidiary facts and, in the first example, the consideration of a vast complex of relationships.* From a practical standpoint, therefore, it may be slightly misleading to characterize true administrative adjudication as 'delegation' by the legislature; a body cannot 'delegate' in any meaningful sense the performance of action it would be incapable of taking on its own even if it had the time and the desire." (75 Harv. L. Rev. at 871; emphasis added.)

Judge Friendly explains this matter further:

> "It will scarcely have escaped your attention that the application of standards of greater or less generality to concrete cases is not a function peculiar to administrative agencies; it has long been practiced by other institutions not unknown to law students. Indeed, at one end of the administrative spectrum, *it is hard to discern much difference between either the problem or the decisional processes of the agencies and those of the courts.*" (75 Harv. L. Rev. at 874; emphasis added.)

Appellants must emphasize again that it is only appellees' abuse of the *adjudicative* functions of the P.U.C. and I.C.C. that are in issue here, not an abuse of the general rule making procedures of the Commissions. Where the appellees have lobbied or used informal political pressure to influence the Commissions' establishment of general rules and regulations applicable to the industry as a whole, appellants believe no complaint can be sustained. Such a function on the part of the Commissions is, as Judge Friendly characterizes it, legislative in nature, and within the protections (and limitations) provided by the *Noerr-Pennington* exemption.

But such pressures are not the methods of which appellants complain. Appellants were damaged by appellees' conspiracy to harass and deter appellants in contested certificate and transfer proceedings in which the Commissions adjudicated the proceedings as a court. Individual appellants petitioned the Commission for a determination of requested rights not for

the industry as a whole, or even a segment of it, but for the particular applicant alone. Each applicant presented a separate concrete case requiring the "accurate ascertainment and proper weighing of scores of subsidiary facts" under the standard of public convenience and necessity. The procedure by which this ascertainment was made, and by which each case was disposed, was judicial from beginning to end, as outlined in the statement of the case above. There can be no doubt that the restraints on appellants in the Commissions were effected through litigation and judicial proceedings and, as such, are subject to the prohibitions of the patent-antitrust cases.

D. The Court Below Misconstrued the Scope and Meaning of the Patent-Antitrust Cases in Failing to Apply Them to the Case at Bar.

The court below distinguished the present case from the patent antitrust cases upon two grounds. First, the court stated that because in those cases there was antitrust activity *in addition to* the filing of harassment suits, and no such additional activity is alleged in the present case, the patent cases do not support appellants' position that mere judicial abuse is sufficient to obtain relief. (R. 63; 1967 Trade Cas., page 84,746.) Appellants respectfully disagree. The invalidity of such a distinction may be illustrated by a comparison between *Pennington* and *Singer*.

In *Pennington* the conspirators engaged in both protected (lobbying) and non-protected anticompetitive activity. The plaintiffs asserted that because approaches by the defendants to the TVA and the

Secretary of Labor were but part of an entire plan of illegal conduct, such approaches were inseparable from the total conspiracy, and therefore should have been condemned with the related activity. The court rejected this contention with the following language:

> "Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act. The jury should have been so instructed and, given the obviously telling nature of this evidence, we cannot hold this lapse to be mere harmless error." (381 U.S. at 670.)

The plaintiffs there were not entitled to an instruction that if the lobbying activities were but a part of an overall anti-competitive scheme, part of which included activities within the Sherman Act, the whole scheme could be declared unlawful. Instead, the Supreme Court segmented the defendants' activities and held that some of them violated the Sherman Act while others—lobbying—did not. This separation of activities arose with respect to the recoverability of damages. Plaintiffs suffered substantial monetary damages by reason of executive action induced by the lobbying activities of the mine owners and the UMW directed to the TVA's purchasing agent and the Secretary of Labor. The court held that damages arising from these activities were not assessable. Plaintiffs were, however, awarded damages resulting from activities other than lobbying and actions taken by the TVA and Secretary of Labor.

A different result is found in *Singer* and the other patent-antitrust cases. In those decisions the Sherman Act was held to be fully applicable to the misuse of judicial machinery. Distinctions have not been made between the anti-competitive behavior of defendants' misuse of judicial machinery and their other behavior not involved with judicial machinery. No decision known to appellants has held that damages could be recovered for one form of behavior but not for the other. On the contrary, in every patent-antitrust or other judicial harassment case, damages have been given not only for anti-competitive activities implemented without the use of judicial procedures, but also for those damages resulting directly from judicial misuse. The clear implication is that judicial harassment in itself, as in malicious prosecution cases, is enough to make out a good cause of action.

Appellants have never asserted, nor would the law support the proposition, that the mere filing of actions without an antitrust purpose can be an antitrust violation. However, appellants disagree with the court below that a plan of litigation, the purpose of which is to restrain trade, with no further acts done or contemplated, cannot be the subject of an antitrust action.

Second, the District Court distinguished the patent-antitrust cases on the simple ground that patents and certificated rights are different, the antitrust laws applying to conspiratorial misuses of the former but not to the latter. (R. 64; 1967 Trade Cas., page 84,746.) 'Appellants do not believe that certificated carriers are any less subject to the antitrust laws than patent hold-

ers. Both patents and certificates are forms of a legal monopoly. Both are subject to protection—or abuse—through litigation. The use of such combined power for anti-competitive purposes, whether it arises from a group of patent holders, a group of certificate holders, or from any other combination of economic power, is behavior which the antitrust laws condemn.

This proposition is well expressed by Toulmin, *Antitrust Laws,* Vol. IV, p. 572:

> "If patent pools are used in a conspiracy—to delay the issuance of patents; if agreements are executed taking from the Patent Office its right of decision as to who was the first inventor; if courts are deprived of the opportunity of determining whether patents, which apparently dominate an industry, are valid; or if a conspiracy is entered into to prevent such patents from being litigated —all of these things may be earmarks of illegal acts.
>
> "In all these things, a common core of truth appears: *It is not the vehicle of the patent pool or the patent that constitute a mechanism of illegality; it is the extracurricular uses to which patents and patent pools are put that spell disaster under the antitrust laws to those who practice such unreasonable restraints in the competitive area."* (Emphasis added.)

The aims of the conspiracy mentioned above are strikingly similar to the aim of appellees. Misuse of courts is most often found in patent-antitrust cases because patent protection involves judicial proceedings. The same, however, is true of certificates of public convenience and necessity. Misuse of the courts and

commissions as a means of effecting an unreasonable restraint is a violation of the antitrust laws no matter where found. The patent-antitrust cases cited by appellants in support of this principle, it should be stressed, were brought to enforce the antitrust laws, not the patent laws.

Each appellee owned certificates granted by the P.U.C. and I.C.C. Each certificate gave its owner the exclusive right to operate as provided in the certificate. That exclusive right was at all times, however, subject to the policy and decisions of the P.U.C. The policy as expressed in their decisions was one favoring competition and a liberal granting of rights. Accordingly, the rights of appellees were limited rights which could not lawfully, within the regulatory scheme, be expanded or made more extensive than the P.U.C. policy permitted.

By employment of their combined power, however, appellees have aggrandized their own common carrier rights in excess of the purview of the regulatory scheme by successfully deterring competitors from seeking competitive rights. The policy of the P.U.C. was to grant certificates liberally. The regulatory scheme provided for competition and, therefore, appellees were not entitled to have their own certificated rights free from competition. The court below recognized the competitive nature of the "certificated" business when it said of appellants:

> "They are simply certificated business entities in an industry which is competitive within a framework of regulation according to standards of pub-

lic convenience and necessity." (1967 Trade Cas., page 84,746; R. 64.)

The combination of appellees, like the combinations of patentees, sought to expand the value of their rights by thwarting competitors by means of a system of litigation, contrary to the policy of controlling statutes and government agencies. That the P.U.C. had a policy in existence which provided that certificated carriers' rights be limited by the competition of other competing certificated carriers cannot be doubted, but is in any event a matter of proof.

E. The Sherman Act Prohibits All Unreasonable Restraints of Trade in the Absence of Specific Exemptions from the Act. Nothing in the Rationale of Noerr-Pennington, Parker v. Brown, the First Amendment or Other Law Exempts Appellees' Activities from the Antitrust Laws.

The Sherman Act has been interpreted by the Supreme Court to reach all anti-competitive activities to the fullest extent permissible within Constitutional limits. *Apex Hosiery Co. v. Leader,* 310 U.S. 469 (1940); *United States v. Frankfort Distillers, Inc.,* 324 U.S. 293 (1945). The Act has great scope in both its adaptability and application, *Northern Pacific Ry. v. United States,* 356 U.S. 1 (1958); *United States v. Hutcheson,* 312 U.S. 219 (1941), and condemns all combinations which unreasonably restrain trade. *United States v. Union Pacific R.R. Co.,* 226 U.S. 61 (1912); *United States v. Line Material Co.,* 333 U.S. 287, 309-310 (1948).

Out of these broad rules of application the Supreme Court has carved certain exceptions, as discussed in

both the holding and dictum of *Noerr*. None of these exceptions, however, encompass anti-competitive schemes of litigation. Nothing in *Noerr* or other authority exempts such activity from the Sherman Act.

The court in *Noerr* refused to apply the Sherman Act to the defendants' activities for essentially three reasons: (1) The Act was found as a matter of statutory construction not to reach political activity because of the adverse impact it would have on our representative form of government; (2) An issue at stake was one of valid government action (passage of the Fair Trucking Bill) excepted from antitrust sanctions under the rule of *Parker v. Brown*; (3) To apply the Act to the facts of *Noerr* was said to raise Constitutional questions concerning the right to petition.

First, the court held that the defendants' combination to influence the political machinery of government was essentially dissimilar to the type of private restraints condemned by the Sherman Act. To extend the Act to such activity would, in the court's view, impair the power of representative government to act on the basis of information provided by its constituents. The court stated its position as follows:

> "In the first place, such a holding [applying the Sherman Act] would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade. In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known

> to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act." (365 U.S. at 137.)

It is apparent that the concern of the court was to preserve the ability of government to act in its representative capacity, through the legislative and executive branches. In so ruling the court believed that intrinsically and fundamentally involved in that role of government is the ability of citizens freely to inform government of their wishes. This is the substance of the activity which is protected by *Noerr.*

These protective considerations do not inhere in the judiciary. Neither *Noerr* nor *Pennington* deal expressly or implicitly with uses of the judicial branch of government. In fact, neither *Noerr* nor *Pennington* even refer to the principles governing misuses of judicial processes set forth in the patent-antitrust cases even though those principles were established law at the time *Noerr* was decided. Certainly the court did not intend to overrule the patent-antitrust cases or the judicial abuse cases *sub silentio* in *Noerr.* This is also clear inasmuch as the court affirmed the illegality of abusive litigation in the *Singer* case two years after *Noerr,* without comment on the *Noerr* exception to the Sherman Act.

That the *Noerr* principle and patent-antitrust principles should not have come into conflict with each other is perfectly understandable. Both principles are derived from different factual circumstances, and both afford different legal protections. *Noerr* did not deal with anti-competitive uses of the judicial function because there was nothing in *Noerr* giving rise to the need to do so. The legal standards and rhetoric set forth in *Noerr* are not understandable or even decipherable as the standards or rhetoric applicable to the role of judicial tribunals as we know them in this country. Judicial tribunals are not representative bodies of government. Nor is it traditionally the role of the judicial branch to become the forum for pressure group activity of the informal, open, free-flowing nature essential to successful representative government by the legislative and executive branches. Such activity, as the language of *Noerr* indicates, is foreign to basic judicial concepts.

The holding of *Noerr* cited above signifies the further concern of the court with maintaining the traditional separation of powers between the judiciary on the one hand and the legislative and executive branches on the other. In *Noerr,* application of the Sherman Act to what were clearly found by the court to be political activities would have been an intrusion by the judiciary upon vital activities necessary to the proper operation of the two representative branches of government. Court-made law which would interpose restraints upon the manner and extent of lobbying these branches would be a serious breach of the

doctrine of separation of powers. The Sherman Act is a court administered law. The determinations of the courts in interpreting the Act has resulted in a substantial body of precedent which is the law of the land. Any interpretation of the Sherman Act which would purport to limit or prescribe to the legislative and executive branches the means or extent to which lobbying activities may be conducted, would constitute an unjustifiable intrusion by the court into matters constitutionally reserved to those other branches. The doctrine of separation of powers is a settled part of constitutional law and would prevent such activity by the courts. *Fletcher v. Peck,* 6 Cranch 87 (1810); *Zorach v. Clausen,* 343 U.S. 306 (1952.) See also *Baker v. Carr,* 369 U.S. 186 (1962.)

The second exception to the Sherman Act's wide coverage relied upon by the court in *Noerr* was its application of the rule of *Parker v. Brown* to the facts of the case. The court in *Noerr* stated:

> "Accordingly, it has been held that where a restraint upon trade or monopolization is the *result of valid governmental action, as opposed to private action,* no violation of the Act can be made out." (365 U.S. at 136; emphasis added.)

Appellants do not argue with the rule of *Parker v. Brown.* The rule simply does not apply to appellants' case.

In *Parker v. Brown,* state directed action was placed under anti-trust attack. The defendants were the California State Director of Agriculture, Members of the State Agricultural Prorate Advisory Commission,

Members of the Program Committee for Zone No. 1, and others. Every defendant in that case was appointed under authority of state law and charged with the administration of the Prorate Act. The Prorate Act provided for reduced production, thus restricting competition among growers and price maintenance. (317 U.S. at 346.) In the absence of statutory authorization for both the official existence of defendants as government administrators and their acts, the challenged activities would have been violative of the antitrust laws.

The claim in *Parker v. Brown* was nothing more than a direct attack upon the carrying out of legislation by persons charged with the responsibility of doing so. It was an assault upon state directed action with which all growers were required by law to comply, rather than an assault upon a private combination acting through their own means.

The proration plan of *Parker v. Brown* was legislatively approved. For this reason, it was state action, not individual action. The discharge of the legislative mandate by a Director, a Commission and a Committee and a vote, all included in the state command, was clearly government action and not individual action. The enforcement of the prorate plan was also authorized and detailed by the state and carried out under its banner. (317 U.S. at 345-348.)

Parker v. Brown distinguished between the Sherman Act application to acts of identical nature, one performed by the government and the other by private individuals:

> "We may assume for present purposes that the California prorate program would violate the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate." (317 U.S. at 350.)

The court described the activity which it ruled Congress had not intended to prohibit by the Sherman Act:

> "Here the state command to the Commission and to the program committee of the California Prorate Act is not rendered unlawful by the Sherman Act since, in view of the latter's words and history, it must be taken to be a prohibition of individual and not state action. It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy. The prerequisite approval of the program upon referendum by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits. The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application." (317 U.S. at 352.)

In the case before the court the formulation of the plan was not approved by any government agency.

It was "individual and not state action." (*Parker v. Brown,* 317 U.S. at 352.) Nor was the effectuation of the plan—the hiring of attorneys, the contributing of money and the filing of protests—legislatively directed.[6] Nor was the enforcement of appellees' plan done pursuant to a legislative or government plan of action. The plan was enforced by dissemination of their plan to other carriers, not to government officials. The threat of use and actual use of these great combined economic forces was brought to bear not upon government but upon competitors. Competitors of appellees had to sustain the economic burden imposed, not the state or its agencies. In the case at bar, state action does not stand between the appellees' activities and their impact upon appellants. Appellants do not seek damages or injunctive relief because of rulings and decisions made by agencies and courts directing that certain acts be performed or foregone by appellees. They seek, rather, relief from the acts of appellees who acted voluntarily without state mandate. Appellees' actions were individual actions, not voluntary state actions. Individual anti-competitive actions, unless they are political activity or constitutionally protected, cannot survive the Sherman Act.

In *Noerr* the Supreme Court summarized its prior holding in *Parker v. Brown.* At footnote 17 of *Noerr* the court said:

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[6]Mere authorization by statute permitting the filing of protests does not legalize violations of the antitrust laws achieved through the use of such means. *Marnell v. United Parcel Service of America, Inc.,* 260 F. Supp. 391 (N.D. Cal. 1966).

> "In Parker v. Brown, 317 U.S. 341, 87 L ed 315, 63 S Ct 307, *supra,* this Court was unanimous in the conclusion that the language and legislative history of the Sherman Act would not warrant the invalidation of a state regulatory program as an unlawful restraint upon trade. In so holding, we rejected the contention that the program's validity under the Sherman Act was affected by the nature of the political support necessary for its implementation—a contention not unlike that rejected here." (365 U.S. at 137.)

In *Noerr* as in *Pennington* the Supreme Court rejected the granting of damages and injunctive relief where it would have had to find that duly achieved acts of the executive and the legislative branches contravened the Sherman Act. The basis of its refusal to invalidate executive and legislative actions taken to the detriment of the truckers and small mine operators, though anti-competitive in nature and clearly induced by private interests, was the rationale of *Parker v. Brown* that the court will not invalidate government action on the basis of the Sherman Act. Appellants have neither sued the government nor are they seeking to invalidate government action. Therefore, *Parker v. Brown* is clearly not applicable.

In *Noerr* the truckers sought injunctive relief only as to the acts of private defendants acting as individuals and not as to acts of government, as was attempted in *Parker v. Brown.* However, damages were prayed for against the private defendants for proximate injury resulting only from the governor's

veto of the "Fair Trucking Bill." (365 U.S. at pp. 130-131.) Neither damages nor injunctive relief were granted because the activities of defendants were found to be purely political and the governor's veto was held to be government action, which it obviously was.

In *Pennington* only damages were discussed (381 U.S. at 669) and as in *Noerr* the court permitted no damages against the private parties because it was clear "under *Noerr* that Phillips could not collect any damages under the Sherman Act for any injury it suffered from the action of the Secretary of Labor" (381 U.S. at 671). However, in *Pennington* damages could have been awarded for defendants' activities which were not actions of the government and did not constitute lobbying.

The act of lobbying by private parties is not government action. Government action can be neither the basis of damages nor an injunction. The act of lobbying by private persons, if considered separately from the government action it seeks to induce, may or may not cause damage. In *Noerr* the publicity campaign, which was found to be an effort, without sham, to influence elected officials, did not in and of itself, without government action, cause damage to the truckers. At least such damage was not claimed because it was stipulated in that case that truckers would seek damages resulting only from the governor's veto.

Appellants believe that it is important to distinguish between the activity of a political nature by

private parties on the one hand, and the ultimate implementation of such activities in the form of government actions or inaction on the other. In the case at bar, appellants have made it clear that they seek neither damages nor injunctive relief for government action or inaction no matter now induced. Accordingly, the question of the rulings or orders of the P.U.C., I.C.C. and courts is not present here. Only the activity of appellees—apart from government review—is at issue in this case. Appellants seek damages for such activities only because they were not political activity and, in the main, were not initiated to induce government action. Hence, appellees are subject to the Sherman Act to the extent that their actions caused damages to appellants. This is so even if additional damages occurred which are not recoverable by appellants because such injury may have resulted from valid government actions or legitimate political activity.

A third exception to Sherman Act application arises in situations where Constitutional freedoms protected by the First Amendment might be abridged by the Act's application. The Supreme Court did not decide in *Noerr* whether such Constitutional rights of defendants would have been violated by the application of the antitrust laws, but acknowledged the presence of the question. The court said:

> "Secondly, and of at least equal significance, such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course,

lightly impute to Congress an intent to invade these freedoms." (365 U.S. at 137.)

Although the holding of *Noerr* was based on a construction of the Sherman Act and not the First Amendment,[7] it is implicit in the decision's language that had the court found the activities of the defendants to be within the reach of the Sherman Act, it would have dealt with the question of whether they were protected by the First Amendment's right to petition for redress of grievances.

The First Amendment does not protect the activities of appellees for two reasons: (1) The right to petition is not an unlimited right. Its limitations and purpose are different in judicial bodies than in the legislative and executive branches of government, and (2) The right is available only to parties who genuinely seek to influence government action. Appellees did not genuinely petition for this purpose.

The right to petition any branch of government, whether legislative, executive or judicial, has never been unlimited. Reasonable regulation of such activities has frequently prevailed against the assertion that there is an absolute constitutional right. *Wilkinson v. United States,* 365 U. S. 399 (1961).

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[7]The court stated this position in footnote 6 of the decision:

"The answer to the truckers' complaint also interposed a number of other defenses, including the contention that the activities complained of were constitutionally protected under the First Amendment . . . . Because of the view we take of the proper construction of the Sherman Act, we find it unnecessary to consider any of these other defenses." (365 U.S. at 132)

The right to petition the judiciary, however, has been treated differently from the right to petition other branches of government. The general meaning of the right to petition government for redress has been held to be a right which existed prior to the adoption of the United States Constitution. The Supreme Court described its origin in *United States v. Cruikshank,* 92 U.S. 551 (1876):

> "The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government. It derives its source, to use the language of Chief Justice Marshall, in *Gibbons v. Ogden,* 9 Wheat. 211 [6 L.Ed. 23], 'from those laws whose authority is acknowledged by civilized man throughout the world.' It is found wherever civilization exists. It was not, therefore, a right granted to the people by the Constitution. The government of the United States when established found it in existence, with the obligation on the part of the States to afford it protection."

In the case of *In re Stolen,* 193 Wisc. 602, 216 N.W. 127 (1927), the court examined the difference between the right to petition before courts and the right to petition representative branches of government:

> "[4] Thus far our discussion has related to petitions as popularly understood. There is a class of petitions which may properly be addressed to courts. They are petitions which conform to the ordinary course of judicial procedure and serve to arouse the jurisdiction or

> action of the court upon justifiable matters. This very proceeding was instituted by a petition signed by the officers of the Dane County Bar Association. That petition aroused the jurisdiction, or action, at least, of this court in the premises. Petitions which have been established as a part of judicial procedure may be presented to courts, and such petitions are the only ones protected by the constitutional provision here invoked." (216 N.W. at 129.)

The distinction between treatment of courts and other branches of government with respect to the right of petition is relevant to illustrate that in *Noerr* the court was clearly alluding to the right to petition representative government. There the court was concerned with the right of people freely to inform government of their wishes in order that the concept of representative government might work. No such concept has ever applied to the judicial branch.

Appellants do not claim that appellees' protests were not incidentally attempts to influence the outcome of judicial proceedings. They were proper in form to be addressed to the courts and agencies. But a use of proper documents does not qualify the appellees for First Amendment protections. The standards governing petitioning of judicial bodies are narrower than those governing access to representative government even though all are protected to a greater or lesser degree by the Constitution.

In *Stolen,* after distinguishing the right to petition courts from other rights to petition, the court made

clear that the former right would not shield persons from abuse of the right:

> "[6] Before closing our discussion on this subject, it may be well to refer to the fact that the Constitution guarantees liberty of speech as well as liberty of petition. While there seems to be no recorded case of an attempt to influence the court by petition, there are plenty of cases in which such attempts have been made through the columns of the press. This is generally held to be an abuse rather than an exercise of the right of free speech, and it is well settled that such efforts to influence the course of justice constitute contempt of court. 6 R. C. L. 508 et seq. The right of petition is no more sacred than the right of free speech, and, as there may be an abuse of the right of free speech, so may there be an abuse of the right of petition. Any attempt to influence the courts of justice constitutes an abuse of either right." (216 N.W. at 129.)

See also *Thomas v. Collins,* 323 U.S. 516, 531 (1945).

The principle that citizens must have free and open access to the courts is applicable to appellants and appellees alike. *Saunders v. Shaw,* 244 U.S. 317 (1917). Both parties possess as part of their right to petition courts the right to prompt determination without delay. *Allegheny County v. Frank Mashuda Co.,* 360 U.S. 185 (1959). They each have these rights but neither has the right to abuse them.

Like the right to petition courts, the right of free speech and press must fall when acts of private citi-

zens make unseemly efforts to pervert judicial action. *Pennekamp v. Florida,* 328 U.S. 331 (1946); *Bridges v. California,* 314 U.S. 252 (1941); *Freeman v. Maryland,* 380 U.S. 51 (1965). In *Sheppard v. Maxwell,* 384 U.S. 333 (1966), the Supreme Court held that free speech must not be allowed to divert a trial from the very purpose of the court system:

> "[2] But the Court has also pointed out that '[l]egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper.' *Bridges v. California, supra,* 314 US at 271, 86 L ed at 207, 159 ALR 1346." (384 U.S. at 350.)
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> * * *
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> "'Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice.' *Pennekamp v. Florida,* 328 US 331, 347, 90 L ed 1295, 1303, 66 S Ct 1029 (1946). But it must not be allowed to divert the trial from the 'very purpose of a court system . . . to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures.'" (384 U.S. at 351.)

Attempts to use judicial hearings for purposes other than that for which they are intended has never been protected by the Constitution's guarantee of the right of petition. Patentees' uses of courts for anti-competitive purposes, even though their processes are ostensibly properly employed, has already been dealt with at length to demonstrate that such protection is not available. Malicious prosecu-

tion and abuse of process are not protected by the right of petition. Appellants submit that the reason stated in *Sheppard v. Maxwell, supra* (384 U.S. at 350), to the effect that acts which derogate from the purpose of the court system are not granted immunity, underlies the finding of liability in those cases as well as the patent-antitrust cases.

The First Amendment provides that there shall be no abridgement of the "right of the people . . . to petition the government for redress of grievances." By its terms such protection extends only to activity which seeks redress. Appellants do not believe that it can be said under any interpretation of the First Amendment that appellees sought redress of grievances. Appellants allege that they sought to prevent appellants from seeking or obtaining their own rights. Redress for appellees was an afterthought, at most a fringe benefit incidentally accruing to them because they chose to use the adjudicative processes of the courts and commissions to deter appellants from seeking rights.

The word redress means remedy of a grievance or vindication of a right by government. It does not contemplate actions which set forces into motion causing other individuals, rather than the state, to act. Appellants cannot believe that the Constitution protects the mere use of the facilities of government no matter how used or for what purpose. The use of such channels for purposes other than seeking of redress is not protected. Appellees have abused these channels by not using them for the purpose for which

the protection was designed. Whether appellees by their activities sought redress or something else is a question of fact. This case cannot be decided, in view of the allegations, solely upon the recognition that government facilities were used by appellees.

The courts, although holding legitimate rights to redress protectible regardless of the purpose involved, have never permitted the sham use of normal channels of petitioning government for some purpose other than petitioning for redress. To be immune appellees must be engaged in protectible activity. If activity done under the guise of petitioning is actually nothing more than a direct restraint upon competitors rather than an inducement of government action, it is sham. As such it is unprotected by the First Amendment and by the express terms of the *Noerr* case itself, as discussed below.

II. NOERR PROTECTION FROM THE SHERMAN ACT DOES NOT EXTEND TO ACTIVITY OSTENSIBLY INTENDING TO INDUCE GOVERNMENT ACTION, BUT ACTUALLY EFFECTING A DIRECT RESTRAINT UPON COMPETITORS.

It is appellants' position here that appellees' actions are subject to the antitrust laws even if it were found as a general proposition that employment of the courts' and commissions' processes for anti-competitive purposes constitutes political activity as defined in *Noerr*. Such a premise is unsupported by *Noerr,* and is positively denied by the patent-antitrust cases. Appellants assume it for the sake of argument only.

Appellants maintain that the manner in which the processes of the courts and commissions have been used in this case does not permit the summary disposition made by the court below. The threshold question must first be asked: In a forum where legitimate activity is protected by a rule of law, is activity which does not seek to use such a forum for its established purposes also protected? It is self-evident that the functions for which the processes of the P.U.C., the I.C.C. and the courts below were established and maintained are to render factual and legal determinations in accordance with prescribed procedural and substantive law. By the same token, it should be evident that the regulatory scheme involved may not legitimately be employed to deter appellants from filing applications and seeking rulings on matters which the scheme was made to regulate. No construction of the Sherman Act, or of *Parker v. Brown,* or of the First Amendment permits any other conclusion.

The Supreme Court in *Noerr* distinguished in clear language between protected attempts to influence the government and unprotected attempts directly to restrain trade. The court first defined activity meant to be exempt:

> "We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." (365 U.S. at 136.)

The court then qualified this position by including under the Sherman Act those activities which were not in fact attempts to influence or persuade government action:

> "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a *mere sham* to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified. But this certainly is not the case here. No one denies that the railroads were making a genuine effort to influence legislation and law enforcement practices." (365 U.S. at 144.) (Emphasis added.)

Appellants have alleged and can prove that appellees' principal purpose was not to attempt to influence government. Appellants have alleged that appellees' activities were attempts to interfere directly with their competitors' ability to obtain operating rights and not to induce government to act. Appellants can establish that the conspiracy alleged was not a genuine effort to obtain government action as in *Noerr*.

In *Woods Exploration and Producing Co. v. Aluminum Company of America,* 36 F.R.D. 107 (S.D. Tex. 1963), the plaintiffs, as in the present case, alleged that the defendants had violated the Sherman Act by a conspiracy to misuse the processes of a quasi-judicial body, the Railroad Commission of the State of Texas. The defendants, it was charged, filed false reports with the commission which impaired the

plaintiffs' rights to engage in the business of producing, selling and transporting natural gas.

The defendants moved to dismiss the action on the grounds that *Noerr* protected the defendants' conspiracy. The court refuted this argument in language which is clear and salutary:

> "The Court [in *Noerr*] found no basis for imputing to the Sherman Act a purpose to regulate *political* activity. . . . [Emphasis by the Court]
>
> "First, is the conduct complained of in the instant case political in nature? If the defendants were enjoined from conspiring to submit false nominations to the Railroad Commission would they be deprived of any constitutional right to petition or participate in the Governmental process? The answer clearly seems to be that the defendants would only be prohibited from undertaking certain joint business behavior. *To subject them to liability under the Sherman Act for conspiring to restrict production or to eliminate a competitor would effectuate the purposes of the Sherman Act and would not remotely infringe upon any of the constitutionally protected freedoms spoken of in Noerr.*" (36 F.R.D. at 111.) (Emphasis added.)

A mere relationship between appellees and government agencies does not make appellees' activities protectible by *Noerr*. The question of *Noerr* protection is specific: Were the activities of appellees truly attempts to influence government to act (or not act), or were they in reality attempts to block competitors from receiving business rights?

At best, appellees' activities were only "ostensibly directed toward influencing government." They were not mainly engaged in the activity of "making a genuine effort to influence" government. These are questions of fact and degree. *Parker v. Brown* does not permit an antitrust violation to arise from regular and valid government action, irrespective of the manner or purpose for which the action was induced. But private action may violate the antitrust laws where the purpose is other than a genuine effort to induce government action. Under the antitrust laws, litigants such as appellants must be permitted to prove at trial that the damaging actions of private persons did not arise from a genuine effort to move government agencies.

Appellees have argued in the court below that language from *Pennington* precludes appellants from inquiring into the sham nature of appellees' activities. They have argued, in effect, that the following passage from *Pennington* completely negates the sham exception found in *Noerr,* and the application of the antitrust laws to sham activity:

> "*Noerr* shields from the Sherman Act a concerted *effort to influence public officials regardless of intent or purpose.* The Court of Appeals, however, would hold the conduct illegal depending upon proof of an illegal purpose." (381 U.S. at 670). (Emphasis added.)

From the language quoted, it is clear that the "regardless of intent or purpose" immunity sought by appellees is operative only when there is an "effort

to influence public officials." *Noerr* makes it clear that not only must there be such an effort, but that it must be a *genuine* effort; a sham attempt will not suffice. Nothing in *Pennington* alters this analysis or negates the "sham" exception found in *Noerr*. On the contrary, the facts in *Pennington* revealed genuine efforts to influence government officials. The "intent or purpose" and "illegal purpose" which *Pennington* held did not render the acts of the conspiracy illegal was clearly their anti-competitive purpose and intent in combining to engage in political activity. However, it is critical to distinguish between anti-competitive purpose and intent on the one hand, and the genuineness of the means used to effect such purpose and intent on the other. Parties found to have anti-competitive intent in lobbying or influencing government are free of the Sherman Act as long as they truly seek to influence government. Parties who do not in fact lobby or genuinely attempt to cause government to act are not immune.

The circumstances surrounding the efforts of the appellees to lobby and influence government agencies within the bounds established by *Noerr-Pennington* must be scrutinized in order to determine the reality or the ostensibility of appellees' apparent efforts to influence government. Accordingly, appellants should be permitted to present evidence bearing on such issues. Appellees' actions in this case would not have been what they were had appellees agreed only to attempt to obtain favorable rulings from the agencies and courts. If such were appellees' true purpose,

they would not have included in their plan the unique features of a publicity campaign intended to convey in unmistakable terms to all competitors the prohibitive expenses of making applications. Nor would their plan have included the decision, made in advance, to oppose every application regardless of its merits. Attorneys' fees involved in carrying an application to the court of last resort are often greater than the worth of the rights themselves. The publicity campaign was particularly devastating because it brought the filing of applications for rights, transfers and registrations from a high level to a practical standstill. In short, appellees' activities demonstrate that their conspiracy was designed to prevent appellants from obtaining competitive rights *not* by defeating appellants on the merits before the commissions, but by directly deterring them from seeking such rights.

The means used by appellees in this case are distinguishable from those used in *Noerr* and *Pennington*. In *Noerr* and *Pennington* the defendants sought to use the functions of government for their anti-competitive purpose. They sought to *induce the government to act*. The railroads and large mine owners were found to have made a genuine effort to influence legislative and executive action. This was not disputed.

In the present case, such a dispute is at the heart of appellants' action. The courts and commissions, though not so intended, can be rendered useless to one group's opponents by the employment of an overwhelming combination of capital and personnel de-

voted to that purpose. Certainly *Noerr* does not protect the design of combined individuals to use government agencies in order to exclude competitors from those same agencies.

The constitutional and governmental protections sought to be established in *Noerr* simply are not at stake in this case. In *Noerr* defendants succeeded in restraining trade by successfully lobbying the executive and legislature of Pennsylvania. The railroad presidents, however, did not attempt to prevent the plaintiffs or other truckers from lobbying or otherwise petitioning and influencing government. In appellants' case, there is an elaborate system of procedural and substantive law to which every trucker is equally entitled. Most appellants and other class members were damaged because, when faced with certain opposition by appellees, they either did not seek rights or having sought them, were forced to compromise them with appellees or abandon them completely.

This critical element of blocking access to governmental agencies was not present in *Noerr*. Had it been, appellants do not believe that the defendants there would have been relieved of liability. In *Noerr* the court characterized the bitter fight between the railroads and truckers:

> "In this particular instance, each group appears to have utilized all the political powers it could muster in an attempt to bring about the passage of laws that would help it or injure the other. But the contest itself appears to have been conducted along lines normally accepted in our political system, except to the extent that each group

> has deliberately deceived the public and public officials." (365 U.S. at 145.)

There is not present in appellees' plan to discourage and prevent truckers from having complete access to regulatory bodies any characteristic which would permit such a plan to be one "normally accepted in our political system." It is no more than a plan to harass and defeat competitors before they ever arrive at their hearings.

Both *Noerr, Pennington* and this action are based upon the actions of those who seek to achieve their aims by making use of government processes to some degree and in some context or other. There the similarity ends. Though it is true that government action was induced and at times resulted in decisions favorable to appellees, the violation complained of here is that appellees' acts resulted from a plan to keep appellants and other class members from seeking the full redress to which they are entitled. The mere fact that judicial bodies acted when procedurally actuated by appellees was simply a function of the method they chose and not the principal purpose or means intended to restrain appellants' competition.

III. APPELLEES' RESTRAINTS UPON APPELLANTS' ACCESS TO JUDICIAL HEARINGS CONSTITUTE ABRIDGEMENTS OF THE FIRST, FIFTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION. SUCH ABRIDGEMENTS SUPPORT A FINDING OF ANTITRUST VIOLATIONS AS WELL.

Appellants, like all other persons, are constitutionally entitled to free access to judicial bodies so long as such petitioning is not utilized for illegal or un-

constitutional purposes. *United Mine Workers v. Illinois State Bar,* ..... U.S. ....., 19 L. Ed. 2d 426 (1967). The courts must always be open and available at reasonable costs. *Conneau v. Geis,* 73 Cal. 176 (1887).

Where the federal courts and I.C.C. are concerned, appellants' right of access is guaranteed by the right of petition and free speech clauses of the First Amendment, and due process clause of the Fifth Amendment. Where the state courts and P.U.C. are concerned, appellants' rights are guaranteed by the First Amendment as incorporated in the Fourteenth Amendment, and by the due process clause, *Railroad Commission of California v. Pacific Gas and Electric Co.,* 302 U.S. 388 (1938), and equal protection clause, *Yick Wo v. Hopkins,* 118 U.S. 356 (1886), of the Fourteenth Amendment.

That appellants have in fact been denied free and reasonable access to the courts and commissions is not subject to dispute here. Appellants and other competitors of appellees have been effectively restrained, prohibited, and deterred from the judicial hearings to which they are entitled by the methods enumerated in the complaint, as discussed above. The denial of these hearings is an accomplished fact. In any event, such denials must be accepted as true for purposes of this appeal.

The only significant remaining question is whether the abridgements of appellants' rights were accomplished by "state action". The law has long held that private parties can vest themselves with the indicia and power of governmental authority sufficient to

make their activities subject to the restraints imposed by the First and Fourteenth Amendments. In *Marsh v. Alabama,* 326 U.S. 501 (1946), where private owners of a "company town" were charged with unconstitutional restraints upon free speech, press and religion, the court held the owners accountable to the First Amendment.

> "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. (citing cases) Thus the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation. And, though the issue is not directly analogous to the one before us we do want to point out by way of illustration that such regulation may not result in an operation of these facilities, even by privately owned companies, which unconstitutionally interferes with and discriminates against interstate commerce." (326 U.S. at 505.)

Any group which assumes the prerogatives and functions of government will be subject to prohibitions directed to the state itself. *Smith v. Allwright,* 321 U.S. 649 (1944); *Terry v. Adams,* 345 U.S. 461 (1953). Private invocation of action by state agencies resulting in the deprivation of constitutional rights is state involvement sufficient to hold the private parties

liable. *United States v. Guest,* 383 U.S. 745 (1966); *United States v. Lester,* 363 F. 2d 68 (6th Cir. 1966).

In the present case, appellees have deprived appellants of their constitutional rights by effectively substituting their conspiracy for legitimate state regulation. Through their large-scale economic and procedural cooperation, appellees have successfully imposed their combination upon the agencies and courts and have thereby determined which carriers shall, and which shall not, obtain certificates, transfers, registrations, and other carriage rights. Their massive protests in the P.U.C. have as a procedural matter disrupted and disoriented hearings to the extent that such hearings have become meaningless as the safeguards of appellants'—and the general public's—carriage rights. Such a misuse of the offices of the state constitutes in itself a denial of procedural due process. It also constitutes a denial of substantive due process with regard to the right to petition and free speech. By effectively turning the state's regulatory scheme into a single-edged sword against appellants and other competitors, appellees' actions further constitute a denial of equal protection of the laws under the Fourteenth Amendment.

The fact that appellees' conspiracy has not operated upon competitors in the form of official state action does not render their conspiracy immune to state action principles. Their combination cannot be permitted to infringe appellants' rights through either direct or indirect action. In *United Mine Workers v. Illinois State Bar,* supra, the Supreme Court said:

> "The First Amendment would, however, be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such." (..... U.S. at ....., 19 L. Ed. 2d at 430.)

In this case, appellees' conspiracy is especially subject to state action principles since the rights which they have sought to control and regulate are also public rights in which the state has a paramount interest. The common carrier rights at stake in this case are designed to serve the public need, without discrimination. Appellants and appellees have been granted rights by state and federal agencies to carry out a state controlled scheme of operation. Holders of these rights must regard them and operate them much as public utilities, and are to that degree extensions of the state itself. Common carriers are thus vested with duties of the state, and as such are even more clearly than other private concerns subject to the state action principles required for the application of constitutional safeguards. *Public Utilities Commission v. Pollack,* 343 U.S. 451 (1952).

Appellants raise these constitutional issues here not for the purpose of vindicating their constitutional rights, although such may be possible. Appellants' purpose is twofold. First, appellants emphasize their earlier argument that the First Amendment considerations raised in *Noerr* do not protect appellees. On the contrary, it is appellants, not appellees, who have been deprived of such rights. Appellees have at no

time been denied access to the courts or agencies. Nor would the relief sought by appellants here deprive them in any manner from access for legitimate purposes.

Second, appellants believe that appellees' violations of competitors' constitutional rights underlines and supports a finding of antitrust violations as well. The antitrust laws are violated whenever individuals combine to restrain trade. Whether such activities also violate other laws or the Constitution does not make the antitrust violation greater once the violation is found, but can assist the court in finding such a violation.

Thus, where a patentee violates the patent laws of the United States by fraudulently obtaining a patent, an antitrust violation results if the defendant knowingly uses the patent to restrain the trade of a competitor. *Food Machinery and Chemical Corp. v. Walker Process Equipment, Inc.,* 335 F. 2d 315 (7th Cir. 1964).

Where a public official combines with a private contractor to violate the bribery laws of the state, such bribery if it injures a competitor is a violation of the antitrust laws. *Rangen, Inc. v. Sterling Nelson & Sons, Inc.,* 351 F. 2d 851 (9th Cir. 1965).

Where competitors combine to make defamatory statements about a plaintiff in violation of the defamation laws, an antitrust violation results because of injury to plaintiff's business. *Northeast Airlines, Inc. v. World Airways, Inc.,* 1967 Trade Cas., page 83,971

(D. Mass. 1967); *Atlantic Heel Co. v. Allied Heel Co.*, 284 F. 2d 879, 884 (1st Cir. 1960).

In short, if constitutional rights are violated, the source of the violation may delineate antitrust violations as well. If anti-competitive considerations are present, the Sherman Act will apply.

CONCLUSION

For the reasons stated, it is respectfully submitted that the district court's order dismissing appellants' cause of action be reversed, and the cause remanded for trial.

Dated, San Francisco, California,
July 5, 1968.

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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